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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/768,394	01/24/2001	Franz Haas	WEB-19967	1357

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EXAMINER

WONG, LESLIE A

ART UNIT	PAPER NUMBER
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1761

DATE MAILED: 05/27/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/768,394

Applicant(s)

HAAS ET AL.

Examiner

Leslie Wong

Art Unit

1761

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 01 December 2004 and 14 March 2005.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 36-59 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 36-59 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- ☐ Notice of References Cited (PTO-892)
- ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____
- ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____
- ☐ Notice of Informal Patent Application (PTO-152)
- ☐ Other: _____

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 36-59 are rejected under 35 U.S.C. 103(a) as being unpatentable over Kim and Kondo as previously set forth. The amendments to the claims are not seen to influence the conclusion of unpatentability previously set forth.

Kim discloses a baked product comprising flour and xylitol as a sugar replacer (see entire document, especially the abstract and claim 1). Kim discloses that the product becomes soft quickly. It is noted that Kim discloses all bakery products (see claim 1), where bakery products would include wafers. Kim also discloses the use of egg, which contains water.

Kondo discloses a cake comprising erythritol as a sugar replacer in the amounts claimed (see abstract). Kondo also discloses xylitol, which is an aliphatic polyol as is claimed. None of the claims specifically claim a flour/starch content that differs from Kondo. Kondo discloses the claimed components and a resulting baked product where deformability at an elevated temperature would be no more than obvious.

The claims differ as to the specific type of baked product and the amounts used.

Once the art has recognized the use of erythritol and xylitol as sugar replacers in baked goods the amount and manipulation of these components would be well-within

the skill of the art. At most the amounts are seen as no more than optimization, see In re Boesch 205 USPQ 215.

It would have been obvious to a person of ordinary skill in the art, at the time the invention was made, to use xylitol and erythritol in baked products because the use of xylitol and erythritol as sugar replacers in baked products is conventional in the art.

Applicant has not established criticality to the amounts claimed. The claimed components are known in the art and are used for their art-recognized function to obtain expected results.

Applicant's arguments filed December 1, 2004 and March 14, 2005 have been fully considered but they are not persuasive.

Applicant argues that the prior art does not teach a product made of flours and/or starches in a major proportion.

Kim clearly teaches the use of xylitol as a sugar replacer. Kim teaches the use of flour. Applicant has not established criticality to the amounts claimed. The claimed components are known in the art and are used for their art-recognized function to obtain expected results.

Kondo clearly teaches the use of erythritol as a sugar replacer, where erythritol is an aliphatic polyol as is claimed. Kondo et al also teach xylitol which is an aliphatic polyol as is claimed. Kondo teaches the claimed components and a resulting baked product where deformability at an elevated temperature would be no more than inherent. It is also noted that the claims are product claims.

The declaration under 37 CFR 1.132 filed December 1, 2004 is insufficient to overcome the rejection of claims 36-59 based upon Kim and Kondo as set forth in the last Office action for the following reasons.

- 1) The declaration does not appear to be commensurate in scope with the claims and does not specifically compare to the prior art.
- 2) No specific data is provided to support the conclusions.

In the absence of unexpected results, it is not seen how the claimed invention differs from the teachings of the prior art. Applicant's claims are drawn to a combination of known components which produces expected results, see *In re Kerkhoven* 205 USPQ 1069 and *In re Gershon* 152 USPQ 602.

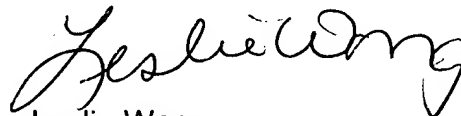
THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Leslie Wong whose telephone number is 571-272-1411. The examiner can normally be reached on Tuesday-Friday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on 571-272-1398. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).



Leslie Wong
Primary Examiner
Art Unit 1761

LAW
May 25, 2005